Supreme Court, U.S.
FILED

05-139 JUL 25 2005

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

DUANE A. OLSON *
DANIEL P. JANTSCH
MICHAEL D. WOLVER
OLSON, JANTSCH & BAKKER, P.A.
7243 North 16th Street
Phoenix, Arizona 85020
(602) 861-2705

JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether privilege or any similar precept may protect medical peer reviews from discovery in federal courts?

PARTIES TO THE PROCEEDING BELOW

Petitioners, defendants-appellants below, are Maricopa County, a political subdivision of the State of Arizona, and its Department of Correctional Health Services. Because neither is a "nongovernmental corporation," no Rule 29.6 statement is required.

Respondents, plaintiffs-appellees below, are Carol Ann Agster, both as personal representative of the Estate of Charles J. Agster, III, deceased, and as a surviving parent of Charles J. Agster, III, and Charles J. Agster, Jr. as a surviving parent of Charles J. Agster, III.

Additional defendants, not participants in the appeal below, are, as denominated in the district court by respondents, the Maricopa County Sheriff's Office, a division of Maricopa County; Joseph M. Arpaio, Maricopa County Sheriff; Betty J. Lewis and John Doe Lewis, her husband; Baruch A. Reusch and Jane Doe Reusch, his wife; Leah R. Compton and John Doe Compton, her husband; Kristine Kemper and James E. Crouch, her husband, aka John Doe Kemper; Amanda S. Garrison and John Doe Garrision, her husband; Susan E. Fisher and John Doe Fisher, her husband; Eric Nulph and Jane Doe Nulph, his wife; Katherina Brokschmidt and Charles Brokschmidt, her husband, aka John Doe Brokschmidt; Michael C. Wilkins and Kathleen Wilkins, his wife, aka Jane Doe Wilkins; Laura Sodeman and John Doe Sodeman, her husband; and John Does I-X and Jane Does I-X.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page
Adkins v. Hospital Authority, 2004 U.S. Dist. LEXIS 23010 (M.D. Ga. Nov. 10, 2004)	9
Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973)	*passim*
Brem v. Drs. DeCarlo, Lyon, Hearn and Pazourek, P.A., 162 F.R.D. 94 (D. Md. 1995)	9
Gillman v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971)	9
Holland v. Muscatine Gen. Hosp., 971 F. Supp. 385 (S.D. Iowa 1997)	9
Jaffee v. Redmond, 518 U.S. 1 (1996)	5, 6, 12, 13
Johnson v. Nyack Hosp., 169 F.R.D. 550 (S.D.N.Y. 1996)	9
LeMasters v. Christ Hosp., 791 F. Supp. 188 (S.D. Ohio 1991)	9
Marshall v. Spectrum Med. Group, 198 F.R.D. 1 (D. Me. 2000)	9
Memorial Hospital v. Shadur, 664 F.2d 1058 (7th Cir. 1981)	7
Nilavar v. Mercy Health Sys., 210 F.R.D. 597 (S.D. Ohio 2002)	9
Poliner v. Texas Health Sys., 201 F.R.D. 437 (N.D. Tex. 2001)	7-8
Spinks v. Children's Hosp. Nat'l Medical Center, 124 F.R.D. 9 (D.D.C. 1989)	8
Swidler & Berlin v. United States, 524 U.S. 399 (1998)	6, 12
Syposs v. United States, 179 F.R.D. 406 (W.D.N.Y. 1998), *adhered to on reconsid.*, 63 F. Supp. 2d 301 (1999)	9
Trammel v. United States, 445 U.S. 40 (1980)	6, 11

TABLE OF AUTHORITIES—Continued

	Page
Tuscon Medical Center v. Misevech, 113 Ariz. 34, 545 P.2d 958 (1976)	13-14
United States v. Gillock, 445 U.S. 360 (1980)	6
United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992)	7, 8
United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)	11
University of Pennsylvania v. EEOC, 493 U.S. 182 (1990)	5, 6, 7
Upjohn Co. v. United States, 449 U.S. 383 (1981)	6, 14-15
Utterback v. United States, 121 F.R.D. 297 (W.D. Ky. 1987)	9
Virmani v. Novant Health Inc., 259 F.3d 284 (4th Cir. 2001)	7, 10
Weekoty v. United States, 30 F. Supp. 2d 1343 (D.N.M. 1998)	9
STATUTES AND RULES	
28 U.S.C. § 1254(1)	2
Ariz. Rev. Stat. § 36-445.01	3
Ariz. Rev. Stat. § 36-2403	3
Fed. R. Evid. 501	2, 11, 12, 15
Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152	5, 10, 11
Supreme Court Rule 10(c)	6
MISCELLANEOUS	
Alissa Marie Bassler, *Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege*, 39 Idaho. L. Rev. 689 (2003)	13

TABLE OF AUTHORITIES—Continued

	Page
David P. Leonard, *The New Wigmore: Selected Rules of Limited Admissibility* (2002)	13
Moore's Federal Practice (3d ed. 2005)	13
Susan O. Schuetzow, *State Medical Peer Review: High Cost But No Benefit—Is It Time for a Change?*, 25 Am. J. L. & Med. 7 (1999)	12
Katherine T. Stukes, *The Medical Peer Review Privilege After* Virmani, 80 N.C. L. Rev. 1860 (2002)	13

IN THE

Supreme Court of the United States

No. ___

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Maricopa County and its Department of Correctional Health Services, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition ("Pet. App.") 1a–5a, is reported at 406 F.3d 1091 (9th Cir. 2005). The order of the district court, Pet. App. 6a–7a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case presents a question under Federal Rule of Evidence 501, which Congress enacted. Rule 501 provides in relevant part as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .

STATEMENT

This case presents an important and unsettled question concerning privileges in federal courts. Virtually all of the states have recognized some form of a medical peer review privilege. Numerous federal courts have done so as well, by following Federal Rule of Evidence 501's directive to apply "reason and experience" with respect to questions of privilege. The Ninth Circuit here nonetheless rejected such a privilege, erroneously crediting Congress's failure to do so in a particular federal statute.

To place the issues in this case in context, it is necessary to set forth (1) the medical peer review requirements to which petitioners and other accredited correctional health providers throughout the nation are subject, insofar as they are relevant here, and (2) the proceedings in the district court and the court of appeals.

1. The Requirements Governing the Preparation of Mortality Reviews by Correctional Health Providers. Through its Department of Correctional Health Services ("CHS"), Maricopa County provides medical care for incarcerated individuals in the Maricopa County correctional facilities. CHS is subject to regulation by the State of Arizona and is accredited by the National Commission on Correctional Health Care ("NCCHC").

The NCCHC promulgates various standards that correctional health providers must follow in order to retain their accreditation. One such standard is No. J-10, which requires both that CHS have a written policy with defined procedures for mortality reviews in the event of the death of an inmate and that, in actual practice, these reviews be carried out. This standard was implemented by CHS through its Policy No. 00-10.0. The express goals of this policy, consistent with NCCHC standard No. J-10, include determining whether appropriate interventions were undertaken in the events immediately surrounding the death, whether there was a pattern of symptoms that might have resulted in earlier diagnosis and intervention, and whether there are emerging patterns when compared with other inmate deaths. Furthermore, all mortality reviews are to remain confidential and privileged based, at least in part, upon the peer review privileges set forth in Arizona Revised Statutes § 36-445.01 and § 36-2403. The result of each mortality review is a written report denominated a Critical Incident Review.[1]

2. Proceedings in This Case. This case commenced in state court on August 6, 2002, with respondents alleging, among other things, that CHS and other entities and individuals were liable in negligence and under federal civil rights law for the death of Charles J. Agster, III, while in a

---

[1] For the sake of consistency, the review will be referred to simply as a "mortality review."

Maricopa County correctional facility. The case was removed to federal court on the basis of federal-question and supplemental jurisdiction.

As part of the discovery process, respondents sought a number of documents related to Agster's death. One was a report that the defendant Sheriff's office prepared as a result of its own extensive investigation of the facts and circumstances surrounding Agster's death. This report was produced to respondents.

Respondents also sought production of the mortality review CHS conducted as a result of Agster's death. At the time of this discovery request by respondents, they had already obtained *underlying* information available to the peer review committee that had conducted the mortality review. In particular, respondents had received in discovery a videotape from the jail, Agster's CHS medical records, and records of interviews of two CHS nurses.

Petitioners resisted discovery of the mortality review itself on the ground that it was privileged as a peer review document. The district court thereupon granted a motion by respondents to compel production of the mortality review. Pet. App. 6a. In doing so, the court stated that "no federal peer review privilege has been adopted in the Ninth Circuit." *Id.* at 7a.

Petitioners appealed to the Ninth Circuit, which found jurisdiction under the *Cohen* collateral-order doctrine. *See* Pet. App. 3a (28 U.S.C. § 1291 grants jurisdiction over district court orders that "'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment'") (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). In explaining this basis for jurisdiction, the court of appeals observed that "[t]he issue is important" and noted that "the

statutory grant of the claimed privilege by Arizona and other states [so] attests." Pet. App. 4a.

The court explained as well that it had the authority to "create a new privilege as a matter of federal common law." *Id.* The touchstone for any such determination is whether there is "[a] 'public good transcending the normally predominant principle' disfavoring testimonial privileges." *Id.* (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996)).

The Ninth Circuit nonetheless declined to recognize the existence of a medical peer review privilege; the court felt itself "constrained by two considerations, one general and the other particular to this case." *Id.* at 4a. The "general" constraint was that the court viewed this as a situation "'where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.'" *Id.* (quoting *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990)). The basis for this view was the Health Care Quality Improvement Act of 1986 (HCQIA), which "granted immunity to participants in medical peer reviews, but did not privilege the report resulting from the process," Pet. App. 4a–5a (citing 42 U.S.C. §§ 11101–11152); Congress also did not specify a statutory privilege when it amended the act in 1987. Pet. App. 5a.

The "particular" constraint identified by the court of appeals is "that the privilege is sought to protect a report bearing on the death of a prisoner." *Id.* The court stated that "[i]n these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided." *Id.*

On this reasoning, the Ninth Circuit affirmed the order of the district court compelling production of the mortality review.